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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19....

No. 922

ALBERT R. HANKINS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Albert R. Hankins prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Tennessee entered in this cause on August 3, 1970.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Tennessee was unreported and not marked for publication. A copy of said opinion is annexed hereto at A1-A2. Copy of the judgment pursuant to the opinion is annexed at A3.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered the 3rd day of August, 1970. Jurisdiction here is invoked under 28 U.S.C. 1257(3).

HOW FEDERAL QUESTION IS PRESENTED

This was a test case to have Sections 59-933 and 59-938 Tennessee Code Annotated declared unconstitutional.

Section 59-933 Tennessee Code Annotated at the time this suit was filed provided that "all motorcycles or motor driven cycles operated upon any highway or public road of this state shall be equipped with crash bars approved by the commissioner of safety."

Section 59-938 Tennessee Code Annotated provides the penalty for violation of Section 59-933 Tennessee Code Annotated, and states it shall be a misdemeanor subjecting the violator to a penalty not exceeding $100.00.

While this case was on appeal, the Legislature of Tennessee saw a portion of the error of its ways, and amended Section 59-933 Tennessee Code Annotated to provide as follows:

> "59-933. Crash bars on motorcycles and motor driven cycles.—All motorcycles and motor driven cycles operated upon any highway or public road of this state shall be equipped with crash bars approved by the commissioner of safety, except in the case where the displacement of the motorcycle engine is seven hundred and fifty (750) cubic centimeters (forty-five and seventy-five/one hundredths (45.75) cubic inches) or less and the operator is twenty-one (21) years of age or older. [Acts 1967, ch. 45, § 1 (T.C.A. (supp.), § 59-943); 1970 (Adj. S.), ch. 345, § 1.]"

Petitioner was indicted for violation of § 59-933 Tennessee Code Annotated on January 27, 1969. A motion to

quash the indictment was filed on the grounds that § 59-933 T.C.A. and its penal statute, § 59-930 T.C.A., were illegal, void and unconstitutional in that they violated due process and equal protection rights of the Fourteenth Amendment to the Constitution of the United States and the right of privacy provision of the Ninth Amendment to the Constitution of the United States.

The trial court found the statutes in question to be constitutional as "a reasonable exercise of their [State legislators] powers to protect the driver and his passengers. . . ."

The trial court stated it could not cite any law with respect to this opinion and could not find any law in support of it.

Petitioner then agreed to be tried by the court without a jury and admitted that at the time of his arrest his motorcycle was not equipped with crash bars and the court found petitioner guilty and imposed a fine of $10.00.

QUESTION PRESENTED

Question No. 1: Was petitioner denied due process and equal protection of the laws as guaranteed him under the Fourteenth Amendment to the Constitution of the United States; and was petitioner denied his right to privacy as guaranteed him under the Ninth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The Ninth Amendment to the Constitution of the United States provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Pertinent portions of the Fourteenth Amendment to the Constitution of the United States provide:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENNESSEE STATUTES INVOLVED

Tennessee Code Annotated:

> "59-933. *Crash bars on motorcycles and motor driven cycles.*—All motorcycles and motor driven cycles operated upon any highway or public road of this state shall be equipped with crash bars approved by the commissioner of safety. [Acts 1967, ch. 45, § 1 (T.C.A. (supp.), § 50-943).]

The 1970 Legislature amended the foregoing statute by adding the following verbiage to the end thereof:

> "except in the case where the displacement of the motorcycle engine is seven hundred and fifty (750) cubic centimeters (forty-five and seventy-five/one hundredths (45.75) cubic inches) or less and the operator is twenty-one (21) years of age or older. [Acts 1967, ch. 45, § 1 (T.C.A. (supp.), § 50-943); 1970 (Adj. S.), ch. 345, § 1.]"

> "59-938. *Violation of §§ 59-933—59-937 a misdemeanor—Penalty.*—Any person who violates the provisions of §§ 59-933—59-937 shall be guilty of a misdemeanor, and, upon conviction, shall be fined an amount not exceeding one hundred dollars ($100) for each violation. [Acts 1967, ch. 45, § 5 (T.C.A. (supp.), § 50-947).]"

REASONS FOR GRANTING THE WRIT

This case presented to the Supreme Court of Tennessee a question of first impression, and as far as can be determined, presents a case of first impression in all the States. There have been cases sustaining the right of the States under police powers to require a motorcycle driver to wear a helmet. *Arutanoff* v. *Metropolitan Government of Nashville and Davidson County*, ... Tenn. ....., 448 S.W.2d 408. However, there have been many cases holding that the requirement that a motorcyclist equip himself with a crash helmet is unconstitutional. *American Motorcycle Assn.* v. *Davids*, (1968), 11 Mich. App. 351, 158 N.W.2d 72.

The Court can readily see that there is a distinct difference between the requirement that a motorcyclist wear a helmet and the requirement that his vehicle be equipped with crash bars. A cyclist without a helmet could have a rock thrown into his head by the action of the tires from traffic ahead of him or passing him, and be struck such a blow as to cause him to lose consciousness and control of the cycle and swerve into the path of other traffic, and cause injury to others as well as himself. The crash bars have nothing whatsoever to do with the manner in which the motocycle is driven and cannot possibly affect the rights, welfare and safety of others using the highways.

The Supreme Court of Tennessee admittedly stated it was upholding the constitutionality of the acts in question here because, ". . . their purpose is the same, the safety of the motorcyclist." A2.

This question is of great importance to every manufacturer of motorcycles in the United States and to foreign manufacturers who do a tremendous business in the United States, especially the makers of the Honda cycle in Japan.

The question presented here is not the right or power of the State through its legislature to regulate traffic on the public highways or to prescribe how the highways may be used, or to prescribe reasonable restrictions on, and conditions for, the use of public highways. Admittedly, the State has that police power. The question presented here is the authority of the State's police power to require one to protect himself from himself, where what he is doing is not in any wise affecting any one else other than himself. No case has been found giving a State any such authority.

Certainly under the Ninth and Fourteenth Amendments to the Constitution of the United States the people reserve to themselves the right to privacy.

The basic premise that man is captain of his own ship and master of his fate has long been followed. The 19th century English philosopher John Stuart Mill well stated this maxim in his essays "Utilitarianism", "Liberty", and "Representative Government". In his essay "On Liberty", he said:

> ". . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The

> only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." *Great Books of the Western World*, Vol. 43, p. 271, Encyclopedia Britannica, Inc. (1st Ed., 1952).

The Court recognized this right to privacy in *Griswold* v. *Connecticut*, (1965), 381 U.S. 479, 494, 85 S.Ct. 1678, 1687, which declared unconstitutional a Connecticut act which prohibited the use of contraceptives.

In *Shelton* v. *Turner*, (1960), 364 U.S. 479, 488, 81 S.Ct. 247, the Court holds:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

See the famous dissent of Justice Lewis Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, wherein he states:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*
>
> • • •
>
> *"Experience should teach us to be most on our guard to protect liberty when the government's pur-*

poses are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." (Emphasis ours).

In *Cooley's Constitutional Limitations*, 8th Ed. 1226, the rights of privacy are described, and in 16 *Am. Jur.* 2d, "Constitutional Law", Sections 358 and 359, it is provided:

> "The term 'liberty', as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to be free in the enjoyment of the facilities with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Where there is a significant encroachment upon showing a subordinating interest which is compelling.
>
> • • •
>
> "Personal liberty largely consists of the right of locomotion—to go where and when one pleases—only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. Under this constitutional guaranty one may, therefore, under normal conditions, travel at his inclination along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected. . . ."

The sole purpose of the requirement of crash bars on motorcycles was for the protection of the cyclist after he had been involved in an accident, so as to keep the motorcycle from pinning down his leg or other portions of his body. The Supreme Court of Tennessee in the decision in this case points this out.

The police powers of a State do not extend to protecting one against himself. As pointed out in *American Motorcycle Assn.* v. *Davids*, (1968), 11 Mich. App. 351, 158 N.W.2d 72, this is governmental paternalism which is an impermissible exercise of alleged police powers by a governmental unit.

The restriction of liberty of the individual solely for the protection of the individual is not a legitimate object of the police power as applied to the regulation of motor vehicles. See 60 C.J.S., "Motor Vehicles", Sec. 15, p. 127, and 16 Am. Jur. 2d "Constitutional Law", Sec. 307, p. 604. See *People* v. *Smallwood*, 277 N.Y.S.2d 429.

A crash bar has nothing whatsoever to do with the safe operation of a motorcycle. In fact, the Court may judicially know that crash bar protruding from the side of a motorcycle constitutes a hazard. A motorcycle being two-wheeled is guided after it gets in motion, not by the turning of the handle bars but by the leaning of the rider to the left or right, and these crash bars have been known to catch onto objects higher than the pavement causing serious accidents and injury to riders. The Court should judicially know that motorcycles are used by hunters and fishermen and outdoor enthusiasts to ride through woods and over fields, [note the television show "Then Came Bronson" whose cycle is not equipped with crash bars]. Instead of being a safety device to the rider, in the instance where cycles are used in woods and fields, crash bars constitute an extreme hazard because they are subject to being caught on stumps and underbrush and other obstacles which the cycle would otherwise miss, if it were not equipped with crash bars.

If this legislation were constitutional a State could prescribe that helmets be worn by automobile drivers.

The National Safety Council states that eighty-five per cent of deaths in automobile accidents are from cranial injuries. To carry this matter to a logical conclusion, if this legislation were constitutional, the State could prescribe every element of dress of a person who rides a motorcycle, or for that matter who rides in an automobile, supposedly to protect him from the consequences of a wreck.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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ALBERT R. HANKINS,
Plaintiff-in-Error,
VS.
STATE OF TENNESSEE,
Defendant-in-Error.

Knox Criminal
Honorable J. Fred Bibb,
Judge, Retired.

For Plaintiff-in-Error:

Honorable W. E. Badgett,
Knoxville, Tennessee.

For Defendant-in-Error:

Honorable David M. Pack,
Attorney General and Reporter,

Honorable W. Collins Bonds,
Assistant Attorney General, Nashville, Tennessee

OPINION

(Filed August 3, 1970)

The sole question presented by this appeal is, whether or not T. C. A. §59-933, requiring motorcycles operating on state highways to be equipped with crash bars is constitutional. (See Footnote 1). Albert R. Hankins was convicted of violating this statute, on a stipulated case tried without a jury, and he has appealed assigning error. We affirm.

In Anately A. Arutanoff v. Metropolitan Government of Nashville and Davidson County, Tennessee, ... Tenn. ....., 448 S. W. 2d 408, we held T. C. A. §59-334 (See Footnote 2) and the Metropolitan ordinance based thereon to

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Footnote 1:

"Crash bars on motorcycles and motor driven cycles.—All motorcycles and motor driven cycles operated upon any highway or public road of this state shall be equipped with crash bars approved by the commissioner of safety." T.C.A. §59-933.

Footnote 2:

T.C.A. §59-934. (formerly §59-944). "Crash helmet required for driver and passenger.—The driver of a motorcycle or

be constitutional, against the same arguments for unconstitutionality made in this case.

Although in that case the violation involved a crash helmet and this case involves crash bars, their purpose is the same, the safety of the motorcyclist.

Particularly applicable, in view of plaintiff-in-error's arguments that crash bars serve no safety purpose, is what we had to say in the Arutanoff opinion on the authority of State v. McKay, 137 Tenn. 280, as follows:

> "In State v. McKay, 137 Tenn. 280, 193 S.W. 99 (1916), this Court held that with the legislature rests the determination of the reasonableness of regulations under the police power, and a court will not examine the question de novo and overrule such judgment by substituting its own, *unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to a mere arbitrary usurpation of power, or is unmistakably and palpably in excess of the legislative power, or is arbitrary 'beyond possible justice' bringing the case within 'the rare class' in which such legislation is declared void.*"

It does not clearly appear that this regulation is beyond reasonable relationship to the subject to which applied, nor is it an unmistakably and palpably excessive use of legislative power, nor is it arbitrary "beyond possible justice." In fact, there is nothing in the record at all on the efficacy of crash bar, so we have only the necessary presumption that they add some safety to motorcycle operation. So, we affirm the constitutionality of the statute and the judgment of the trial court.

PER CURIAM.

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motor driven cycle and any passenger thereon shall be required to wear a crash helmet of a type approved by the commissioner of safety."

SUPREME COURT OF TENNESSEE AT KNOXVILLE
SEPTEMBER TERM 1969

DECREE

Filed Aug. 3, 1970
John A. Parker, Clerk

Albert R. Hankins
Vs.
State of Tennessee

Knox County Criminal
Affirmed

This cause coming on to be heard upon a transcript of the record from Criminal Court of Knox County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that the cause is remanded for the collection of costs and the fine of $10.00.

Costs of the appeal will be paid by Albert R. Hankins, for which let execution issue.